Kentucky May Coal Company, Inc.—River Division and Double C Construction, Ltd. *and* United Mine Workers of America. Cases 9–CA–31604 and 9–CA–31912

April 27, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

The issues presented in this case[1] are, inter alia, whether the judge correctly found that Respondent Kentucky May Coal Company violated Section 8(a)(1) of the Act by interrogating employees, soliciting employee grievances, and threatening employees and violated Section 8(a)(3) and (1) of the Act by contracting out operations and shifting two employees to salaried positions.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.

ORDER[3]

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Kentucky May Coal Company, Inc., Catlettsburg, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(d) and reletter the subsequent paragraphs.

''(d) Soliciting grievances from employees and explicitly or impliedly promising to remedy them during an organizational campaign.''

2. Substitute the following as paragraph 2(a).

''(a) Rescind the contract entered into with Double C Construction, Ltd. on February 11, 1994; if requested by the Union, rescind the unilateral wage increases granted to the employees and reinstate the wage rates in effect prior to the changes, and bargain in good faith with the Union over these subjects.''

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT contract out operations in order to frustrate and defeat your efforts to be represented by the United Mine Workers of America or any other union.

WE WILL NOT discharge, permanently lay off, or otherwise offer benefits in order to prevent or deter you from seeking to be represented by the United Mine Workers or any other union.

WE WILL NOT change terms and conditions of employment or otherwise discriminate against any of you for supporting the United Mine Workers or any other union.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT threaten you with discharge, layoffs, plant closure, or unspecified reprisals if you choose the United Mine Workers or any other union as your collective-bargaining representative.

WE WILL NOT say, or create any impression, that it would be futile for you to choose the United Mine Workers or any other union as your collective-bargaining representative.

WE WILL NOT coercively ask you to withdraw support for collective-bargaining representation by the United Mine Workers or any other union.

WE WILL NOT solicit grievances from you and explicitly or impliedly promise to remedy them during an organizational campaign by the United Mine Workers or any other union.

[1] On January 26, 1995, Administrative Law Judge Robert T. Wallace issued the attached decision. Respondent Kentucky May Coal Company, Inc., Respondent Double C Construction, Ltd., and the General Counsel filed exceptions and supporting briefs. Respondent Kentucky May Coal, Inc. filed an answering brief to the General Counsel's cross-exceptions. The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

There are no exceptions to the judge's findings about violations of Sec. 8(a)(1) which occurred prior to the subcontracting of operations on February 14, 1994.

[3] We authorize the General Counsel to seek such temporary relief or restraining order under Sec. 10(e) as he finds appropriate for the enforcement of this Order.

WE WILL NOT prevent or inhibit you from soliciting support for the United Mine Workers or any other union in a legitimate manner and at proper times and places.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL cancel the contract entered into with Double C Construction, Ltd. on February 11, 1994, and WE WILL, if requested by the United Mine Workers, rescind the unilateral wage increases granted to you and reinstate the wage rates in effect prior to the changes.

WE WILL offer those of you who were laid off on February 14, 1994, immediate and unconditional reinstatement to your former jobs or, if no longer in existence, to substantially equivalent jobs, without prejudice to your seniority or other rights and privileges previously enjoyed, and WE WILL make you whole, with interest, for any loss of earnings and other benefits suffered as a result of your unlawful layoffs.

WE WILL recognize and, on request, bargain in good faith with the United Mine Workers as your exclusive representative with respect to rates of pay, hours of work, or other conditions of employment; and should any understanding or agreements be reached, on request of the United Mine Workers, embody the same in a written and signed instrument; and the appropriate unit is:

> All employees, including weighmen and/or scalehouse operators, employed at our Boyd County coal dock and Lawrence County coal yard, excluding all professional employees, guards and supervisors as defined in the Act.

KENTUCKY MAY COAL COMPANY, INC.

Carol L. Shore, Esq., for the General Counsel.
Forrest H. Roles and *Terrance J. Nolan, Esqs. (Smith, Heenan & Althen)*, of Charleston, West Virginia, for Respondent Kentucky May.
Cecil C. Varney, Esq., of Williamson, West Virginia, for Respondent Double C.
Molly Kettler Wade, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT T. WALLACE, Administrative Law Judge. These cases[1] were tried in Catlettsburg, Kentucky, on August 9–11, 1994.[2] Charges were originally filed on February 18 and June 9 and an amended consolidated complaint issued on July 22.

At issue is whether Kentucky May Coal Company, Inc. violated Section 8(a)(1) and (3) of the National Labor Relations Act by interrogating, threatening, and coercing employees about their sympathies toward and activities on behalf of the Union; by terminating the entire work force and subcontracting its dock and coal yard operations to Double C to avoid unionization; and by subsequently recalling and converting two employees to salaried status to discourage support for the Union. Double C Construction, Ltd., a claimed agent of and a joint employer with Kentucky May, is alleged to have violated the same section by soliciting employees to revoke authorization cards, by threatening reprisals, and by granting wage increases and changing other terms and conditions of employment in order to discourage continued support for the Union. The requested remedy is an order requiring Kentucky May to rescind its contract with Double C, resume operations, and recognize the Union as bargaining representative of its employees. Alternatively, the General Counsel requests an order requiring both Respondents, as joint employers, to recognize and bargain with the Union.

A proceeding for injunctive relief under Section 10(j) of the Act was pending at the time of this trial.[3]

On the entire record, including my observation of the demeanor of the witnesses, and, after considering briefs filed by the General Counsel and separately by Kentucky May and Double C,[4] I make the following

FINDINGS OF FACT

I. JURISDICTION

Kentucky May, a corporation with an office in Catlettsburg, operates a barge dock in Boyd County, Kentucky, and a coal crushing yard in Lawrence County, Kentucky, from where it annually ships goods valued in excess of $50,000 directly to points outside the Commonwealth of Kentucky. Double C, a corporation with an office in South Williamson, Kentucky, provides employment services for coal companies and related enterprises; and in connection therewith annually provides services valued in excess of $50,000 to various coal companies directly engaged in interstate commerce. Respondents admit and I find that they are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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[1] McGinnis, Inc. is not named as a Respondent in the formal documents and was not represented at the trial. That entity is not further considered in this decision. (McGinnis, Inc. was mentioned in the caption.)

[2] All dates are in 1994 unless otherwise indicated.

[3] By letter dated January 9, 1995, Kentucky May moves to amend its answer to the complaint by pleading collateral estoppel citing *Frye v. Kentucky May Coal Co.*, Civ. No. 94–132, slip op. at 1–2, 9 (E.D.Ky. 1994), wherein a district court dismissed the 10(j) proceeding. Since the critical issue there was substantially different from that ultimately at issue before this Board, the motion is denied. See *Coronet Foods v. NLRB*, 981 F.2d 1284 (D.C. Cir. 1993); *NLRB v. S.E. Nichols, Inc.*, 862 F.2d 952 (2d Cir. 1988).

[4] The General Counsel filed a motion to strike Double C's brief because it was postmarked on the due date and failed to contain transcript citations. No one appears harmed by the cited derelictions, and the motion is denied.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Kentucky May, a wholly owned subsidiary of Electric Fuels, Inc.,[5] produces 5 to 6 million tons of coal annually at approximately 28 mines in Kentucky. Its River Division has numerous facilities for the processing and transportation of coal, including as here pertinent, a ''truck to barge'' river dock on the Big Sandy River near Catlettsburg, a coal crushing yard (Belfry No. 5) situated about 10 miles away, a deep water port in New Orleans, Louisiana, a coal receiving terminal in Cincinnati, Ohio, and terminals on the Kanawha River located in Marmet, Quincy, and Ceredo, West Virginia, the latter being acquired in June. Double C was formed in 1993. It acts as a labor broker typically to nonunion employers in the coal mining industry.

At pertinent times in 1994, Kentucky May employed approximately 26 hourly employees on 3 shifts at the Big Sandy dock and Belfrey yard. Ted Warden was dock superintendent and was assisted by three salaried foremen including Keith Pettit and John Webb, admittedly agents and supervisors within the meaning of Section 2(11) of the Act. Dockside facilities include a trailer which serves as an office, a scalehouse where trucks are weighed, and an auger station where incoming coal is sampled for size and quality. On the other side of a highway which traverses the dock facility are several trailers used as main offices.

Near the end of January a group of at least six employees, including Frank Conley and Glen Pritchard, went into the dock trailer at about 6:30 a.m. and vociferously complained to Foreman Pettit about perceived unfairness in the amount of the production bonus they had just received for the month of December. Pettit's initial reaction was sympathetic. He told them they needed to organize because, otherwise, ''they . . . was going to keep on . . . shorting us on our bonus.'' He then challenged Conley to call a union and handed him a phone book. After a brief discussion, the employees asked Conley to call a UMW number; and in Pettit's presence he attempted unsuccessfully to place the call.

Later that day Conley contacted the Union. A campaign ensued with virtually all employees being asked to sign cards reading as follows:

AUTHORIZATION FOR REPRESENTATION

> I, the undersigned employee of Kentucky May Coal Company, River Division, Catlettsburg, KY authorize the UNITED MINE WORKERS OF AMERICA to represent me as exclusive collective bargaining agent in all matters pertaining to wages, hours, terms and conditions of employment. This authorization cancels any similar authority previously given any other person or organization.

By February 8, approximately 20 employees signed such cards.

[5] Electric Fuels, in turn, is wholly owned by Florida Power Company.

B. *Events of February 9–13*

Within the next 2 days Pettit had a change of heart and both he and Superintendent Warden began to interrogate and threaten employees regarding their union activities.

On February 10, dockhand Jeff Haynes was present in the dock trailer while Pettit was talking on the phone to Alfred Verardi who, as director of operations for Electric Fuels, had overall responsibility for its Kentucky May-River Division. After hanging up, Pettit volunteered that Verardi wanted to know if ''you guys were trying to go union or not.'' He also quoted Verardi as saying ''If you . . . try to go union, they would just shut it [the facilities] down because they couldn't afford to go union.''[6] This repetition of a comment by a high-ranking company executive patently constitutes an unlawful threat of retaliation, as alleged in paragraph 7(a)(ii) of the complaint.

Later that day Pettit approached Haynes and two other employees (Anthony Smith and John Harris) who were working out on the dock. None of them wore union insignia, and there is no evidence that they had otherwise evinced union sympathies. He told them Warden had asked him to inquire if you guys want to go union, adding: ''He needs to find out.'' All three had signed authorization cards; and one of them, probably Harris, replied ''Tell him yes.'' On the same day employee Timothy Stevens was alone in the scalehouse when Pettit came in and asked if he was ''going union.'' When Stevens said ''Yeah,'' Pettit inquired: ''Have you thought about it?'' Again Stevens replied ''Yeah.'' Without further comment Pettit turned, got into his truck, and drove off. Stevens too had not previously declared his union sentiments. These interrogations, apparently done at Warden's behest and intended to probe the extent of union support during an ongoing organizing campaign, are impermissibly coercive and violative, as alleged in paragraph 7(a)(i).

Either on February 10 or 11 Pettit had occasion to ride with Glen Pritchard to Belfrey No. 5. After talking about union cards being signed, Pettit laughed and said he'd told Superintendent Warden ''we ought to fire the whole damn bunch.'' In light of Verardi's previously communicated threat of closure, Pritchard was justified in doubting that Pettit was merely joking. Here also I find an unlawful threat of retaliation as alleged in paragraph 7(b)(i).

John Riffe is Kentucky May's customer relations representative and also has a role in arranging for blending of various coals. In the latter capacity he regularly worked with Lundie Blevans, an hourly employee who sampled and graded coal on trucks as they arrived on the dock.

On the night of February 9, Riffe telephoned Blevans at the latter's home and arranged for Blevans to meet him and Superintendent Warden at a local restaurant on the following day. According to Riffe, he made the arrangement because Warden wanted to meet with Blevans ''in a neutral area'' to try to find out what's going on at the dock.

Blevans, who wore no union insignia and had given no indication of his sympathies, arrived at the appointed time. The meeting lasted about 15 minutes. Although present throughout, Riffe said nothing. Warden began by asking if employees were signing union authorization cards. Uncomfortable,

[6] Verardi's assertion that his telephone records show no calls to the dock area around the time in question is not corroborated by any documentary evidence.

Blevans said ''No'' then immediately reversed himself and volunteered that he had signed a card. Warden inquired as to what he could do ''to keep it [the Union] out.'' Blevans replied that it was too late, adding that ''we've been lied to too much.'' There ensued a brief discussion of Blevans' complaint about low wages. After observing that a raise had been promised for April, Warden told Blevans that Kentucky May could not afford to pay out all the extra money unions require for various funds. The meeting ended when Warden got up and, before leaving, told Blevans ''I wouldn't tell anyone about this conversation.''[7] I find the incident to involve unlawful interrogation, solicitation of grievances, and an implied threat of closure, as alleged in paragraph 8(a).

On Sunday, February 13, the Union held its first general organizing meeting at a hotel on Main Street in Ashland, Kentucky. Sometime prior to the meeting, employee Lloyd Hall stopped his vehicle for a red light on Main Street about a block before the front entrance to the hotel. He claims that on his right waiting for the light to change was a green four-wheel drive vehicle being driven by Superintendent Warden who was talking on a cellular phone. When the light changed both vehicles proceeded to the end of the next block where Hall made two left turns and parked in the lot of the hotel while the other vehicle continued down Main Street. Hall states that the union meeting began about an hour or an hour and a half later. Even assuming Warden was in the other vehicle,[8] I find the evidence insufficient to establish he knew anything about the union meeting or did anything other than ride a vehicle past a place where it was to be held. The allegation of unlawful surveillance in paragraph 8(b) is dismissed.

C. *Subcontracting*

Hourly employees arriving at work on Monday morning, February 14, many wearing union insignia acquired at the meeting on the previous day, were each given a form letter signed by Warden which reads as follows:

> To enhance economics, better use of the facilities and improve management of the business, the Company has decided to contract out the operation of the dock. Effective today, you are laid off. Because the Company expects the contracting arrangements to be permanent, that layoff is permanent also. The Company appreciates your service. Your final check will be mailed to you on February 17, 1994, or may be picked up at the office on that day.

Having received no prior warning, the employees were confused. Warden and other supervisors directed them to an office trailer across the road where representatives of Double C invited them to fill out applications for employment. By the end of the day all did so, some after conferring with union officials. Most were hired within the week, others within the next few months. They returned to work at the same jobs they had previously performed, under the same supervisors, and under a changed wage/benefit package which included a slightly increased hourly rate, elimination of tonnage bonuses, and different health insurance coverage.

Coming as it did during an organizing drive fraught with acts (heretofore and hereafter found) manifesting antiunion animus on the part of Kentucky May management, the contracting out gives rise to a rebuttable inference that it was motivated by that animus and that the resulting permanent layoffs and changed terms and conditions of employment imposed by Double C are unlawfully discriminatory, as alleged in paragraphs 11(a) and 13(a). Accordingly, Kentucky May has the burden of persuasion that the contracting out had a legitimate nonpretextual motive and would have occurred regardless of the existence of protected union activity.[9] Evidence in that regard will be discussed at a later point.

D. *Subsequent Events*

Amon Mahon is employed by a company identified as ''Black Metals'' and he is ''sort of'' the managing director of Double C, a company he describes as basically a labor broker for coal mine owners. He was in the trailer office on February 14 and oversaw the hiring of former Kentucky May employees. That evening Verardi, Kentucky May's top executive overseer, came to him and asked him to ''unhire'' Stevens and Jim Bush, both of whom had performed ''scalehouse operations'' (weighing and grading coal on incoming trucks) for Kentucky May. He explained he'd had second thoughts and now wanted his own employees to perform those operations thereby to maintain closer contact with suppliers. Mahon complied and at his suggestion the two individuals went to see Verardi on the next day. The latter, after observing that the scalehouse job was now a salaried position, offered it to them with a warning that if they declined he'd hire others who would accept salaried status. Faced with unemployment, the men agreed. Their duties remained the same but their overall compensation was higher than before. Both had signed authorization cards on February 8. As noted above, information that Stevens had done so had been elicited by Foreman Pettit during an unlawful interrogation.

Representatives of Kentucky May provided no explanation on this record as to why it chose at that particular time to create a salaried position out of what had previously been an hourly wage job. In the circumstances of this case the plain implication is that the price of their increased compensation and new management status was relinquishment of union support and the alternative was unemployment, an iron fist in a velvet glove approach. I find this violative of Section 8(a)(3) and (1) of the Act, as alleged in paragraph 12.

Shortly after Stevens returned to work on February 16, he was approached by Pettit, now a Double C foreman with the same duties as before. Pettit, apparently anticipating a rep-

[7] While Warden admits being at the restaurant, he claims he arranged the meeting simply to help Blevans, ''a happy go lucky guy,'' who he perceived as being depressed. He could not recall ever having met with an employee offsite before this time. Assertedly, he asked Blevans only about the cause of his depression and Blevans replied that he was worried about not making enough money. Riffe, however, testified that Warden asked, ''What's the problem on the dock?'' and that Warden, in response to Blevans' reply, stated, ''None of us feel we're making enough money.'' He asked Blevans, ''Are there any other problems?'' Riffe further testified that when Blevans replied, ''No, just money,'' Warden told Blevans ''We really couldn't afford a raise at that time . . . we'd just have to shut the dock down.''

[8] Warden testified he was nowhere near Ashland on the day in question.

[9] See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 445 U.S. 989 (1982).

resentation election, told Stevens ''you would be foolish to vote for a union . . . [b]ecause you'd just be an unemployed union man.'' This clearly implies that continued support for unionization was futile. The statement, therefore, violates Section 8(a)(1), as alleged in paragraph 8(b)(ii).

On February 17, laid-off employees Haynes, Glen Pritchard, Donald Dixon, and Charles Carraway arrived together at the Kentucky May office to turn in equipment and pick up their last checks per instructions in the letter given them on February 14. Haynes and Dixon had worked as deckhands on river barges and had not been hired by Double C because it lacked insurance for that work. While they were waiting, Superintendent Warden passed nearby and Haynes took the opportunity to ask ''Why did you do this to us? What's going on? You know that I've worked hard . . . [and] bent over backwards to do good work for the company.'' When Warden avoided answering, Haynes heatedly again asked ''Why?'' Warden replied, ''Well, you boys brought it on yourselves.''[10] In the circumstances of this case, that comment could refer only to the employees' efforts to unionize. Here, too, I find a violation of Section 8(a)(1), as alleged in paragraph 8(c).

Laid-off employee Lloyd Hall also appeared at the Kentucky May office on February 17 to pick up his check.[11] While he was doing so, Foreman Pettit told him ''they was going to bring in cards for us to disperse the union [drive].'' When Hall replied, ''I'd have to go with the majority,'' Pettit opined ''that might be a bad mistake.'' The latter comment is an unlawful solicitation to refrain from engaging in protected activity, as alleged in paragraph 7(b)(iii).

As president of Double C, Burt Stanley oversees operations at the Kentucky May dock, and for that purpose he visits there about once a week. Between February 17 and early March, he distributed an envelope to employees of Double C who had been laid off by Kentucky May. The envelope was addressed to the Union and contained, together with a postage, prepaid blank return receipt, a typewritten note as follows:

> UMWA
> P.O. Box 2068
> Pikeville, KY 41502
> (606) 437–7378
>
> I, _____, want to revoke my card I sent you. I want my privileges back.
>
> _____
> Signature
>
> _____
> Date

On handing out the envelope he made a point of telling each of them he didn't want to know whether they had signed cards or what they would do with the envelope. He explains that he prepared and distributed the envelope after receiving a telephone call from a person who asked, without identifying himself, how he could go about withdrawing an authorization card. He states he prepared the handout by himself and did not discuss it with anyone from Kentucky May before distributing it.[12]

I find this also constitutes an impermissible interference with employees' Section 7 rights. Even assuming he received the anonymous call, Stanley's gesture went beyond simply answering a question and rendering assistance to a troubled employee. He went out of his way to facilitate a wholesale withdrawal of cards; and despite his assurances of no interest one way or another in employees' union activities, the underlying message was clear. Having once been laid off for signing cards they well might infer that failure to withdraw them would jeopardize their jobs. Accordingly, I find an unlawful solicitation to withdraw union support, as alleged in paragraph 9.

A further indication that antagonism toward union supporters continued under Double C is manifested in various encounters between John Webb, a former supervisor of Kentucky May who continued in that capacity under Double C, and former Kentucky May deckhand Dixon, who was hired by Double C Foreman Pettit in early April.

On reporting to work Dixon wore a union badge bearing the words ''Vote Yes,'' and his truck bore a bumper sticker with the same legend. Within a few days someone using a black marker wrote ''No'' over the ''Yes'' while his truck was parked in the Kentucky May dock area. Irritated, he placed a spare sticker over the defaced one, walked away for a short distance, and waited. He saw Webb walk by the truck, then pause, and stare at the new sticker. Dixon called out ''Caught you, didn't I?'' Webb laughed and admitted marking up the sticker and also to having torn one off Hall's car. Asked whether he laughed along with Webb, Dixon testified: ''Well, yeah . . . I laughed with him . . . I was mad, but . . . [you] couldn't . . . say nothing to your boss, really . . . [but] I told him not to touch my truck again.'' I find a violation of Dixon's right under Section 7 to solicit support for the Union, as alleged in paragraph 10(c).

Webb also commented at various times, usually during lunchbreaks until Dixon was again laid off in mid-May, on Dixon's open support for the Union. Among other things, Webb told Dixon that the Union was out to break the Company, that he (Dixon) didn't know what he was getting into in opposing a big company like Kentucky May, that continued organizing efforts would result in union supporters being ''all gone,'' and that if he (Webb) lost his job, ''heads are going to roll.'' Finally, and in a fit of anger, he told Dixon, ''You are definitely gone . . . for letting everybody know where you stand and what you think.'' The statements convey unlawful threats of loss of jobs and discharge, as alleged in paragraphs 10(a) and (b).

E. *Respondents' Evidence*

Kentucky May contends that its subcontracting of operations at the Big Sandy river dock and Belfrey No. 5 was motivated solely by perceived inherent economies and was not influenced in any way by employees' efforts to unionize.

[10] The incident is described by each of the employees and their testimony is substantially the same.

[11] Hall had been hired by Double C on February 16 and returned to work that same day.

[12] While Stanley claims to have been unaware of any union activities until February 22, he was present at the dock on February 14 helping Mahon hire former Kentucky May employees. Asked whether he saw any of them wearing union insignia that day, he replied, ''I may have, but I didn't—don't recall.''

Its parent, Electric Fuels, regularly utilizes the services of contractors to operate numerous coal mines and its new river dock at Ceredo. David Carter, senior vice president of Electric Fuels, explains that subcontracting to small independent operators offers greater efficiency. In particular, he claims it insulates against common cyclical fluctuations such as weather and coal prices, thereby allowing for increased cost stabilization and also permits better allocation of various liabilities that arise from maintenance of a work force such as workers' compensation and unemployment.

As indicative of consideration being given to increased use of subcontracting antedating union organizing efforts, Carter points to a memorandum dated October 22, 1993, which he directed to two individuals responsible for coal mining operations. The document reads as follows:

> We need to stabilize and level off our costs. We should look at each of our mining operations and evaluate whether we should consider hiring a contractor to operate the coal washing plants and our unit train loadouts at each division.
>
> Let's discuss the above proposal at our next profit center meeting.
>
> If you have any questions, please contact me.

He claims to have discussed the matter ''back and forth . . . [s]ometime in the winter'' with the two officials and also with Verardi.

For his part Verardi, purportedly in response to the above, sent Carter a form solicitation (a ''Dear Employer'' letter) he received from Double C on January 13 with his handwritten notation, as follows: ''This could be the answer to our goal.''

On February 8 or 9, and at the request of Verardi, Kentucky May Superintendent Warden met briefly with Double C Representative Mahon. Warden testified that he broached the possibility of a labor services contract, but only ''in general terms.'' No contract language or terms were discussed, and the only accomplishment was to put Mahon in telephone contact with Carter.

There ensued several long-distance calls between Mahon and Carter and these were followed up on Friday, February 11, with an evening meeting between Verardi and Mahon at which two agreements were signed, one relating to the river dock operation and the other to the nearby coal crushing facility.[13] The agreements in substance were the same and did not vary significantly from Double C's ''standard'' contract with mining companies.[14]

Although the agreements provide that Double C is responsible for fixing the compensation of workers, each contains an appendix which lists hourly rates for various classifications plus an increment over each rate. The latter represents adjusted hourly rates (labeled ''costs''). Under the agreement, Kentucky May agrees to pay weekly the incremental rate to Double C ''for each hour of straight time and overtime worked by the Workers.'' Mahon understands that although Double C is free to pay workers more than the hourly rates specified, the incremental rate paid it by Kentucky May remains unchanged absent the latter's agreement to pay more. On a number of occasions the appendix was modified to provide increased incremental rates after Double C increased hourly rates paid to workers.

Under the agreement Double C undertakes to provide liability insurance in specified amounts, and to pay all employment and related taxes. Also, it assumes responsibility for worker training with costs being passed on to Kentucky May. The latter has the right to reject workers, and either party may terminate at any time without cause on written notice.

Double C had no prior experience in running a river barge terminal. Its two operating officials, Manager Mahon and President Stanley, rely principally on former Kentucky May foreman Keith Pettit to oversee daily operations at the dock and coal yard and he, in turn, receives instructions from Ted Warden who continues as Kentucky May's onsite superintendent. The trailer office and telephone used by Pettit are provided by Kentucky May without charge and, in accord with past practice, Kentucky May continues to provide vehicle and tool allowances for its former supervisors and mechanics who continued in that capacity when hired by Double C.

I am not persuaded that Kentucky May would have subcontracted operations at the facilities in question on or about February 11 absent onset of the union organizational activities there.

Contracting out at those facilities does not appear to have been seriously considered until the very week union organizational activities began, and it was initiated and accomplished in haste after Kentucky May had knowledge of the campaign. Other than sheer coincidence, no explanation is offered as to why contracting out of operations at these facilities was accomplished suddenly and at this particular time.[15] In those circumstances, and in light of the animus heretofore found, I conclude that the sole motivating factor was a desire to circumvent and defeat unionization by lopping off in one fell swoop virtually all its work force.

F. *Double C*

I find the relationship between Kentucky May, on the one hand, and, on the other, Pettit, Webb, and Stanley sufficiently close as to constitute the latter agents of the former at least for the purpose of attributing to Kentucky May the heretofore described violations of Section 8(a)(1) perpetrated by them while working for Double C. In particular, I think it highly unlikely that Double C president, Stanley, undertook to facilitate employee withdrawal of authorization cards in a matter ostensibly relating only to the Union and Kentucky May without the latter's knowledge and consent.

In light of the rescission requirement provided below in the remedy section, I find it unnecessary to determine on this record whether Double C is a joint employer as alleged in the complaint.

[13] Carter testified, ''We really didn't get serious about signing a contract with . . . [Double C] until the week the thing was signed.'' Tr. 557–558.

[14] Representatives of Kentucky May and Double C were unable to provide in response to subpoenas any data (correspondence, memos, drafts etc.) pertaining to the agreement.

[15] In this respect I note that none of its other river dock operations had been subcontracted as of February 11 and that while operations at the subsequently acquired dock at Caredo were contracted out, employees there had been represented by the Union just prior to the subcontracting.

G. *Credibility Determinations*

In almost every instance I have resolved conflicts in testimony by crediting hourly employees. Their accounts contain ample corroborative detail, appear unfeigned, and were unshaken by cross-examination. In contrast, company witnesses typically, and unpersuasively, simply denied ever having made statements attributed to them.

CONCLUSION OF LAW

Respondent Kentucky May violated the Act in the particulars and for the reasons stated above, and its violations have affected, and unless permanently enjoined will continue to affect, commerce within the meaning of Section 2(6) and (7).

REMEDY

In addition to the customary cease-and-desist order and requirement for notice posting, my Order will require Kentucky May (1) to rescind the contract entered into with Double C on February 11, (2) to offer permanent, immediate, and unconditional reinstatement to all the employees unlawfully laid off on February 14, (3) to make them whole for any loss of earnings and other benefits,[16] and (4) to recognize and, on request, bargain with the Union as the exclusive representative of its employees in the unit designated below in regard to terms and conditions of employment and, if an understanding is reached, embody it in a signed agreement.

Rescission. Restoration of the subcontracted work appears to be an appropriate and indeed necessary remedy in light of the severity of the violations found. Compare *N.C. Coastal Motor Lines*, 219 NLRB 1009 (1975), enfd. 542 F.2d 637 (4th Cir. 1976); *Lear Siegler, Inc*., 295 NLRB 857, 861 (1989). It is particularly feasible here since the contract by its terms is rescindable at will and without notice and the same employees working under the same supervision have remained at the facility. Further, in light of Double C's complicity it can hardly claim ''clean hands.'' And even if that were not the case, vindication of the statutory rights of the employees discriminated against outweighs the economic interest of Double C.

Bargaining Order. Since *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969), it has been settled law that authorization cards signed by employees may serve as the basis of a bargaining order where they reflect majority support for a union just prior to employer actions which negate any likelihood of a fair election.[17]

Such is the case here.

It is undisputed that as of February 8, 20 of Kentucky May's 26 hourly employees had signed cards authorizing the Union to represent them. There ensued a series of unlawful interrogations and threats of discharge and plant closure. Then, on February 14, Kentucky May without prior warning dismissed its entire work force, an action found to be motivated solely by a desire to prevent unionization. The impact on employees is epitomized by Jeff Haynes' poignant inquiry to Superintendent Warden: ''Why did you do this to us? What's going on? You know that I've worked hard . . . [and] bent over backwards to do good work for the company,'' and by the latter's taunting reply ''Well, you boys brought it on yourselves.'' See *Great Chinese American Sewing Co*., 227 NLRB 1670, 1671 (1977), enfd. 578 F.2d 251, 256 (9th Cir. 1978); *NLRB v. Townhouse T.V. & Appliances*, 531 F.2d 826, 830–831 (7th Cir. 1976).

I find (1) that the following employees of Kentucky May constitute an appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act:

> All employees, including weighmen and/or scalehouse operators, employed at Kentucky May's Boyd County coal dock and Lawrence County coal yard, excluding all professional employees, guards and supervisors as defined in the Act;[18]

(2) that on February 8 a majority of employees in the unit selected the Union as their representative for purposes of collective bargaining; (3) that since then the Union, by virtue of Section 9(a) of the Act, has been and is the exclusive representative of the unit for purposes of collective bargaining with respect to wages, hours, and other terms and conditions of employment; and (4) that the unfair labor practices found are so serious and substantial in character that the possibility of erasing their effects and of conducting a fair election by the use of traditional remedies is slight, and the employees' sentiments regarding representation, having been expressed through authorization cards, would, on balance, be protected better by issuance of a bargaining order.

Broad Order. Because the serious and egregious misconduct shown here demonstrates a general disregard for the employees' fundamental rights, I find it necessary to issue a broad order requiring Kentucky May to cease and desist from infringing in any manner on rights guaranteed employees by Section 7 of the Act. *Hickmont Foods*, 242 NLRB 1357 (1979).

Except to the extent found, Kentucky May is not shown to have violated the Act in other ways.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[19]

ORDER

The Respondent, Kentucky May Coal Company, Inc.—River Division, Catlettsburg, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about union sympathies, support, and activities.

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[16] Amounts to be computed on a quarterly basis from the date of layoff to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[17] The absence of a specific union demand for recognition and bargaining does not preclude a remedial bargaining order. See *NLRB v. Daybreak Lodge Nursing & Convalescent*, 585 F.2d 79, 82 (3d Cir. 1978); *Panchito's*, 228 NLRB 136, 137 fn. 7 (1977), enfd. 581 F.2d 204 (9th Cir. 1978).

[18] Although nominally denied by Kentucky May, the unit appears clearly appropriate. Both before and after the unfair labor practices, employees at the two facilities shared common supervision, were interchanged, and performed similar work.

[19] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Threatening employees with discharge, layoffs, plant closure, or unspecified reprisals if they chose the United Mine Workers of America or any other union as their collective-bargaining representative.

(c) Telling employees that it would be futile to choose the United Mine Workers or any other union as their collective-bargaining representative.

(d) Coercively soliciting employees to withdraw support for collective-bargaining representation by the United Mine Workers or any other union.

(e) Preventing employees from soliciting support for the United Mine Workers or any other union in a legitimate manner and at proper times and places.

(f) Changing terms and conditions of employment in order to deter or divert employees from seeking to be represented by the United Mine Workers or any other union.

(g) Discharging, permanently laying off, or otherwise discriminating against employees because of their support for, and activities on behalf of, the United Mine Workers or any other union.

(h) Contracting out operations in order to frustrate and defeat employee efforts to be represented by the United Mine Workers or any other union.

(i) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the contract entered into with Double C Construction, Ltd. on February 11.

(b) Offer to the employees unlawfully laid off on February 14 immediate and unconditional reinstatement to their former jobs or, if no longer in existence, to substantially equivalent jobs without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole, with interest, for any loss of earnings and other benefits suffered as a result of their unlawful terminations in the manner set forth in the remedy section of this decision.

(c) Recognize and, on request, bargain in good faith with the United Mine Workers as the exclusive representative of its employees in the appropriate unit with respect to rates of pay, hours of work, or other conditions of employment; and should any understanding or agreements be reached, on request of the United Mine Workers, embody the same in a written and signed instrument; and the appropriate unit is:

> All employees, including weighmen and/or scalehouse operators, employed at Kentucky May's Boyd County coal dock and Lawrence County coal yard, excluding all professional employees, guards and supervisors as defined in the Act.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its facilities in Boyd and Lawrence Counties, Kentucky, copies of the attached notice marked ''Appendix.''[20] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

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[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''